Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TOWNSHIP OF NORTH BERGEN, NEW JERSEY,

Petitioner,

—v.—

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and THE NEW JERSEY STATE CONFERENCE, NAACP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THOMAS J. BIAMONTE

GIBLIN & GIBLIN
2 Forest Avenue
Oradell, New Jersey 07649
(201) 262-9500

Attorneys for Defendant/Petitioner Township of North Bergen

67 pp

QUESTION PRESENTED

This case presents a substantial issue of public importance with respect to the interpretation and application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and (k)(1)(A)(i) ("Title VII"): Specifically, may the courts below properly fashion a remediation plan, with the stated purpose of eliminating disparate racial impact on African Americans, but which effectively mandates reverse discrimination in municipal employment against residents of the Township of North Bergen, New Jersey?

LIST OF PARTIES

The National Association for the Advancement of Colored People, and The New Jersey State Conference, NAACP were plaintiffs in the District Court and appellees/cross-appellants in the Court of Appeals.

The Township of North Bergen, New Jersey was a defendant in the District Court and an appellant in the Court of Appeals.

The State of New Jersey, Department of Personnel was a defendant in the District Court and filed an Appearance form but did not file a brief or participate in oral argument before the Court of Appeals.

James McLarnon, Daniel Peschetti, Toni Anne Rodriguez, Pedro Luis Rodriguez, Eddie Somick, Walter Somick, Pete Ruts, Jim Cowan, Christopher Seliga, Robert Farley, John Shearstone, Pete Giunchini, Lou Romano, Thomas Ferrari, Tushar Patel, Gregory Deacutis and Richard Castellito were each intervenor-defendants in the District Court, and filed an appearance as an appellant, joing appellant North Bergen's brief, but did not argue in the Court of Appeals.

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OPINIONS BELOW

On March 19, 1996, the Hon. Maryanne Trump Barry issued an Opinion (Pet. App. 18) and Order (Pet. App. 15), invalidating North Bergen's residency requirement[1] for the hiring of municipal employees on the basis of disparate impact on the surrounding area's African American population, in alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and (k)(1)(A)(i).[2]

On November 5, 1996, the District Court denied North Bergen's application to add several large surrounding municipalities[3] with similar residency requirements as parties to this action, thereby preventing a fair and "global" remediation plan, which would have provided equal public sector employment opportunities for North Bergen residents. (Pet. App. 13)

On November 20, 1996, Judge Trump Barry issued a Decree (Pet. App. 5), establishing a remediation plan for the express purpose of expanding employment opportunities for African Americans, but with the concomitant effect of eliminating municipal employment opportunity for North Bergen residents based on the existence of residency requirements in many of the communities in the surrounding labor market.

On October 15, 1997, the Court of Appeals issued a summary affirmance of the District Court determinations. (Pet. App. 1)

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[1] New Jersey statutory law permits municipalities to impose a hiring practice based on residency. N.J.S.A. 40A:9-1.3. (Pet. App. 20)

[2] On March 26, 1996, the District Court Judge entered an Order, deleting the last sentence of the carryover paragraph on page 9 of her Opinion (Pet. App. 24), striking the provision which held that the burden of persuasion remained with plaintiffs/respondents in rendering the analysis required by 42 U.S.C. § 2000e-2(k)(1)(A)(i). (Pet. App. 17)

[3] Petitioner sought to implead the municipalities of Newark, Orange, East Orange, Bloomfield and Irvington. (Pet. App. 13)

STATEMENT OF JURISDICTION

The Judgment Order of the Court of Appeals for the Third Circuit was filed on October 15, 1997. (Pet. App. 1) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioner Township of North Bergen requests that this Court interpret the following provisions of Title VII of the Civil Rights Act of 1964 and its amendments, 42 U.S.C. § 2000e *et seq.*:

> § 2000e-2. Unlawful employment practices
>
> (a) Employer practices. It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .
>
> § 2000e-2. Unlawful employment practices
>
> (k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . .

STATEMENT OF THE CASE

On January 20, 1995, plaintiffs/respondents The National Association for the Advancement of Colored People and

The New Jersey State Conference, NAACP, (collectively "NAACP" or "respondents") filed suit in the United States District Court, alleging, *inter alia*, that defendant/petitioner Township of North Bergen ("petitioner" or "Township" or "North Bergen") had engaged in a racially discriminatory practice through enactment and implementation of a hiring preference for Township residents in public employment. (Pet. App. 34) North Bergen first imposed a residency requirement, Ordinance No. 1825-76, for public employment in 1976, requiring all Township employees to be "bona fide residents" of the municipality.[4] (Pet. App. 20)

Upon respondents' Motion for Summary Judgment, Judge Trump Barry determined to permanently enjoin North Bergen's residential preference practice in municipal hiring, based solely on a statistical finding of disparate impact on the area's African American population, in violation of Title VII, 42 U.S.C. §§ 2000e-2(a) and 2(k)(1)(A)(i). (Pet. App. 5, 18, 25-28) Disparate impact is defined as a "facially neutral employment practice [which] may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a 'disparate-treatment' case." *Wards Cove Packing Company, Inc. v. Atonio*, 490 U.S. 642, 645, 109 S.Ct. 2115, 104 L.Ed.2d 733, 744 (1989)

In rendering her determination in favor of respondents, the District Court Judge "compared the racial composition of employees in the position in question with the composition of those in the 'relevant labor market.' " (*Id.* at 24) *Wards Cove*, *id.* at 650; 104 L.Ed.2d at 747; *Newark Branch, NAACP v. Township of Harrison, New Jersey*, 940 F. 2d 792, 798 (3d Cir.

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[4] Because New Jersey law prohibits the imposition of a residency requirement as a condition of continued employment for municipal police officers and firefighters, N.J.S.A. 40A:14-9.1 and -122.1, Ordinance No. 1825-76 does not apply to these departments. (Pet. App. 21) Residency requirements for North Bergen's police and fire departments are set forth in Ordinance No. 544-94, which requires residency as of the date of appointment of police and fire candidates. (*Id.*)

1991) Judge Trump Barry found that the demographic distribution of North Bergen is approximately 50-51% Caucasian, 42% Hispanic, 2-4% Asian, and 1-2% African American, based on available 1990 Census data (*id.* at 19), and compared this with the percentage of African Americans in North Bergen's municipal work force, .55%. (*Id.* at 25) The court below then compared the distribution of African Americans in the full-time municipal work force in Hudson County,[5] 19.4%, (*id.*), and with North Bergen's "private, non-municipal work force," 8.4%. (*Id.* at 26) Applying these statistics, the court below concluded that the disparity in African American employment was "most likely caused by a force other than pure chance." (*Id.* at 27)

Holding that North Bergen had proffered insufficient objective evidence to demonstrate that its residency requirement for municipal employment was "job related for the position in question and consistent with business necessity," 42 U.S.C. § 2000e-2(k)(1)(A)(i), the District Court enjoined enforcement of this employment practice and directed the parties to confer to fashion an "appropriate remedy for the discriminatory effect of North Bergen's residency requirement," consistent with the *Harrison* decision. (Pet. App. 33)

When the parties were unable to agree on an appropriate remedy, the court below filed its Decree on November 20, 1996. (Pet. App. 5) Most significant to this appeal is Judge Trump Barry's finding in the Decree:

> Importantly, and statistical disparity aside, plaintiffs have not alleged even the specter of racism on the part of the Township of North Bergen in promulgating and enforcing its residency requirements and preferences and, presumably for that reason, counsel for plaintiffs stated at the final oral argument in this matter that plain-

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[5] North Bergen is one of 12 municipalities which comprise Hudson County, New Jersey. (Pet. App. 19)

> tiffs' objective is to ensure that North Bergen's employment opportunities are available to all. . . .
>
> There being no allegation and, certainly, no evidence that the statistical disparity seen here is the result of any prior discrimination against African Americans or that race was a factor in who could or could not apply for municipal positions, there is no discrimination based on race to remedy and a race-based remedy would, therefore, be not only unnecessary but wholly inappropriate. . . .

(Pet. App. 6) (Citations omitted.)

Thus, the court below, in addition to invalidating the residency requirement and vacating all existing lists of eligible applicants for municipal employment compiled by the New Jersey Department of Personnel, determined to effect a recruitment process and reporting requirement of new hires and terminations based on residency and job classification for a five year period, holding that

> Such a requirement will enable North Bergen to demonstrate that its history of enforcing residency requirements and preferences—the only cause of disparate impact alleged in this case—is no longer deterring non-residents from applying for employment with the township, and that any unlawful effects caused by that history have been remedied.

(Pet. App. 10-11)

Judge Trump Barry specifically declined to impose a reporting requirement based on race, reiterating that a race based reporting requirement would be wholly "inappropriate." (*Id.* at 10)

LEGAL ARGUMENT

THE REMEDIATION PLAN SHOULD BE REMANDED TO THE DISTRICT COURT TO ELIMINATE ITS REVERSE DISCRIMINATORY EFFECT ON NORTH BERGEN RESIDENTS.

The remediation plan imposed by the District Court is fatally flawed because it impermissibly harms the rights of innocent third-parties, i.e., the residents of North Bergen, who now must compete with non-residents for municipal jobs within the Township while, simultaneously, being foreclosed from obtaining employment in surrounding municipalities with exclusionary residency requirements. (Pet. App. 5) *United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203, 223 (1987). Thus, by reason solely of residence, North Bergen's population is placed at a severe competitive disadvantage to job applicants in surrounding municipalities with residency preferences. This, by definition, constitutes reverse discrimination. *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996)

Petitioner moved to join some of the surrounding municipalities with residency requirements to establish the District Court's jurisdiction for the purpose of granting reciprocal employment rights to North Bergen residents in those communities. If, for example, a Newark resident may apply for municipal jobs in both Newark and North Bergen pursuant to the Decree, then simple fairness and equality require that a North Bergen resident be permitted to apply for a municipal job in Newark, notwithstanding the application of Newark's residency requirements to other non-residents.[6] By denying that Motion, the District Court declined to join

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[6] This argument applies equally to the other municipalities which North Bergen sought to implead before the District Court: Orange, East Orange, Bloomfield and Irvington, New Jersey.

parties necessary for the implementation of a fair and reciprocal remedy.

It should be noted that North Bergen has not sought to invalidate Newark's residency requirement in its entirety. The Township merely seeks to carve out an exception, based on reciprocity for North Bergen residents. Petitioner does not challenge the District Court's obligation to remedy the effects of disparate impact. It simply requests that this remedy not create a further wrong, i.e., reverse discrimination.

Joinder of these additional municipalities remains necessary to provide complete relief to all parties, as well as to all present and future applicants of all races, and to ensure the existence of a "level playing field" within the relevant labor market. Petitioner sought a more precisely tailored remediation plan, to preserve the rights of all North Bergen residents, including members of the municipal Hispanic community, as well as seeking to increase the number of African Americans in the Township's employ. Under the reciprocity remedy urged by petitioner, non-residents of North Bergen may compete for public jobs in North Bergen so long as a corresponding municipality provides reciprocal opportunities to North Bergen residents. Failure to provide this reciprocity creates, not eliminates, discrimination in employment opportunity by bestowing multiple employment opportunity on some, at the expense of diluted job opportunity for innocent North Bergen residents. This inequality is anathema to the principles of fair employment opportunity on which Title VII is based.

The Decree imposed by the District Court disproportionately affects another protected class who reside in North Bergen in substantial numbers, Hispanics. (Pet. App. 7) In the matter at bar, petitioner compiled a factual record of the employment practices of surrounding municipalities, the racial impact of those practices on Hispanics, and an itemization of municipalities with residency requirements. (Pet.

App. 41 and 44) Yet, the court below effectively ignored this data in fashioning its remediation plan.

That the District Court understood the negative effect of its ruling on North Bergen's substantial Hispanic community is demonstrated by the following inclusion in the Decree:

> This court cannot ignore the fact—and fact it be—that what this case is all about is the impact *not* of discrimination against one group of non-residents but the impact of residency requirements applied equally against all non-residents. To order that discrete relief be specifically targeted only at African Americans will result in fewer job opportunities for other racial and ethnic groups, most particularly Hispanics. This court will not give with one hand only to take with the other, particularly given its obligation to consider, among other factors, the impact of relief on the rights of third parties. *United States v. Paradise*, 149, 171 (1986).

(Pet. App. 7) (Footnote omitted.)

Nevertheless, the trial court's remedy failed to ameliorate the harsh impact on the Township's Hispanic population.

Discrimination, in any form, is repugnant in a civilized, fair society. As held by this Court in *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943),

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality . . . [and] racial discriminations are in most circumstances irrelevant and therefore prohibited.

Examination of the relevant caselaw involving classification based on race demonstrates an evolving jurisprudence with respect to the Court's view on reverse discrimination. In *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the Court considered an

equal protection challenge to a state-run medical school's reservation of spaces for minority students in its entering class. In his plurality decision, Justice Powell wrote that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color," and concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and would thus call for the most exacting judicial standard." *Id.* at 289, 98 S.Ct. at 2748.

In *Wygant v. Jackson Board of Ed.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the Court again considered a Fourteenth Amendment challenge to remedial racial classification: whether a local school board may adopt race-based preferences in lay-off determinations. In Justice Powell's plurality opinion for the Court, he observed that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Id.* at 274, 106 S.Ct. at 1847.

In *City of Richmond v. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), the Court reviewed a municipality's determination to allot a percentage of its contracting work to minority-owned businesses. In its decision to strike down this program, the Court ultimately agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. *Id.* at 493-494, 109 S.Ct. at 722.

In the Court's most recent decision on this subject matter, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 221, 115 S.Ct. 2097, 2110 (1995), the Court made the following insightful comment,

> Despite lingering uncertainty in the details, . . . the Court's cases through *Croson* . . . established three general propositions with respect to governmental racial classifications. First, skepticism: '[a]ny preference based

> on race or ethnic criteria must necessarily receive a most searching examination;' . . . Second, consistency: 'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification' . . . And third, congruence: '[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.' . . .

(Citations omitted.)

The Court in *Adarand, supra* at 226, 115 S.Ct. at 2112, concluded that,

> 'A free people whose institutions are founded upon the doctrine of equality,' [*Hirabayashi, supra* at 2113, 63 S.Ct. at 1385] should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

However, despite the progression of Supreme Court decisions in the reverse discrimination arena, no decision of this Court resolves the issue of what constitutes an appropriate non-race based remedy in a disparate impact case or, if, or in what narrow circumstance, reverse discrimination may be permitted as the effect of a disparate impact remediation plan. The Township of North Bergen respectfully requests that this Court grant certiorari to analyze and determine this significant question of public importance.

CONCLUSION

For the reasons set forth herein, petitioner Township of North Bergen respectfully requests that this Court reverse the decisions of the District Court and Court of Appeals, denying North Bergen's Motion to implead surrounding municipalities with residency requirements as parties to this action and remand this matter to the District Court for implementation of a remediation plan which does not impermissibly harm the rights of innocent third-party residents of North Bergen as applicants for municipal employment.

THOMAS J. BIAMONTE

2 Forest Avenue
Oradell, New Jersey 07649
(201) 262-9500

Attorneys for Defendant/Petitioner Township of North Bergen, New Jersey